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No. 95-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF RESPONDENTS

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This brief for the National Right to Work Legal Defense Foundation ("Foundation") is filed pursuant to Rule 37.3 with the written consent of all parties. The brief supports the position of the respondents.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

The Foundation has provided the attorneys and the funding for a long string of victories before this Court vindicating the statutory and constitutional rights of employees to be free from being forced to choose between their jobs and the compelled support of the political activities of labor unions. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

The Foundation not only helps employees to protect their political beliefs from infringement through compulsory unionism, it also assists employees whose religious beliefs are violated through compulsory unionism. *See, e.g., Wilson v.* NLRB, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 500 U.S. 1218 (1992); EEOC *v. University of Detroit*, 904 F.2d 331 (6th Cir. 1990); *IAM v. Boeing*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

In hundreds of other cases throughout the country, the Foundation is now aiding employees who seek to limit their forced association with unions and their financial payments to those unions.

Amicus National Right to Work Legal Defense Foundation believes that the decision of the U.S. Court of Appeals for the Fifth Circuit was correct. However, *amicus* will not analyze this case on the basis used by the Court of Appeals or any of the parties. Instead, *amicus* argues that the Religious Freedom Restoration Act is constitutional because *Employment Division v. Smith*, 494 U.S. 872 (1990) was wrongly decided. If this Court revisits *Smith*, and reinstates the rule that existed before *West Virginia Board of Education v. Barnette*, 319 U.S. 624

(1943), the separation of powers arguments leveled by the Petitioner fail.[1]

SUMMARY OF THE ARGUMENT

The interests of the government in preserving the aesthetics of religion ("beautiful, stone church," Pet. brf. at 2) are pitted in this case against the substantive interests of church members in worshiping God. In Exodus, chapter 32, the Bible records the well-known story of God's people creating a golden calf to worship while Moses was on the mountain receiving the Ten Commandments. Upon Moses return, a serious discussion over the substantive aspects of worship ensued with the result that the golden calf was destroyed. Exodus 32:20. Had this occurred within the City of Boerne, Ordinance 91-05, proclaiming the City's cultural interest in preserving "architectural, archeological, cultural, social, economic, ethnic and political history" (Cert. Pet. App. 47a), might have transformed the golden calf into a permanent impediment to true worship.

In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 559 (1993), Justice Souter stated in his concurring opinion, "in a case presenting the issue [of the proper rule to apply in a Free Exercise claim], the Court should reexamine the rule *Smith* [*Employment Division v. Smith*, 494 U.S. 872 (1990)] declared."

This is that case. The rule presently applied to Free Exercise claims substitutes "neutrality" and "general applicability" for a critical weighing of the interests of the state against the impact upon individual worship. At present, the most mundane governmental interests, if neutral, can trump the most central rights of religious worship.

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[1] *Amicus* does not suggest that Petitioner's separation of powers argument should otherwise prevail or that *Smith* must be reversed for respondents to prevail.

The Court below based its decision (as it must) on the assumption that the *Smith* test controlled. This Court, however, can affirm on a different ground than that considered by the lower court. *Quackenbush v. Allstate Insurance*, ___ U.S. ___, 116 S. Ct. 1712, 1718 (1996). Although *amicus* realizes that in the "Questions Presented," Petitioner did not include whether the *Smith* rule should be revisited, it explicitly referred to the "criticism [of that rule] by members of this Court ... as well as others" (Cert. Pet., p. i) and raised whether Congress could impose "federal policy to accommodate religious exercise more than the Constitution requires." (*Id.*, p. ii) On that basis, *amicus* believes that what the "Constitution requires" is fairly embraced in the questions before this Court. *See, Lebron v. National R.R.Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 965-66 (1995).

This Court should reconsider and reverse *Smith* for three reasons. First, when a legal rule is in transition, this Court has acknowledged that it takes seriously the opinions of law professors and students. If this Court lends an ear to law students, how much more it should listen to Congress, a co-equal branch of government. Congress has spoken, and it believes *Smith* was wrongly decided.

Second, the *Smith* rule applies a completely different standard to the analysis of Free Exercise claims than is applied to any other First Amendment claim. This Court would not allow Congress to pass a law which said that religious claims are given separate and inferior treatment. Such a law would not even pass the *Smith* test. If the courts would not allow Congress to create such a rule, this Court should not permit such a situation to continue to exist in its own decisions.

Third, the *Smith* rule has no "roots." The compelling interest standard, on the other hand, can trace its roots back 200 years. The compelling interest standard has such deep "roots" because it more ably draws the line between government regulation and individual religious freedom. The compelling interest standard

examines the relative interests of the state and the believer and looks at the damage to religious freedom. It does not limit courts to a superficial examination of whether the state specifically targeted religion. It would not, for example, permit the government's interest in the aesthetic results of religion override the substance of religious worship.

If this Court reconsiders and reverses *Smith*, then Congress and the Court agree and the separation of powers issue evaporates.

ARGUMENT

THE *SMITH* RULE SHOULD BE ABANDONED IN FAVOR OF THE LONG-ESTABLISHED COMPELLING STATE INTEREST RULE.

I. Congressional Interpretation Of The First Amendment Is A Basis For Reconsidering *Smith*.

When this Court reversed the rule announced in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) ten years later in *Continental T.V. v. GTE Sylvania*, 433 U. S. 36 (1977), it prominently cited "the great weight of scholarly opinion [that] has been critical of the decision...." *Continental T.V.* 433 U.S. at 48-49. When reversing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) and correcting years of vacillation on the appropriate standard, this Court in *Adarand Constructors v. Pena*, ___ U.S. ___, 115 S. Ct. 2097 (1995) said, "We also note that *Metro Broadcasting's* application of different standards of review to federal and state racial classifications has been consistently criticized by commentators." *Adarand*, 115 S. Ct. at 2115.

If the views of law professors and law students are relevant to whether a matter has been wrongly decided, how much more pertinent is the opinion of Congress, a co-equal branch of

government! As this Court recalled in *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980):

> [W]e are bound to approach our task [of passing on the Constitutionality of an act of Congress] with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment. Art. I, § 8, cl. 1; Amdt. 14, § 5. ...
>
> Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.

The Petitioner argues that congressional disagreement with the *Smith* rule demonstrates that Congress has overstepped its authority under section 5 of the fourteenth amendment. Leaving to the parties the argument on the question of the scope of congressional authority under section 5, congressional passage of the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.*) unambiguously shows that, at a minimum, a co-equal branch of the government believes that the majority of this Court was wrong in *Smith*. This alone should cause this Court to reconsider the *Smith* rule.

II. The Court Should Reconsider *Smith* Because The "Preferred" First Amendment Right To Freely Exercise Religious Beliefs Is Given "Second Class" Status.

In *Smith*, a bare majority of the Court decided that the universal test for evaluating First Amendment rights should no longer be applied to the First Amendment right of Free Exercise of religion. Instead of applying the compelling interest test which protects the First Amendment rights of speech, press, assembly and petition, *see, e.g., Wooley v. Maynard*, 430 U.S. 705, 716 (1977), the Court held any "neutral law of general applicability"

that violates an individual's religious beliefs is constitutional, *Smith*, 494 U.S. at 879, no matter how serious (or central) the infringement upon the individual's religious belief. *Id.* at 886-87.

All of the rights under the First Amendment are "preferred" and none are entitled to a higher place than the others. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *see, Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). As a practical matter, *Smith* set aside the First Amendment right of Free Exercise of religion and gave it "second class" status to the other First Amendment rights. As *Smith* acknowledged, there are only two situations in which the compelling interest standard is applied to Free Exercise claims: when the Free Exercise claim is teamed with other (apparently more worthy) First Amendment claims, *Smith*, 494 U.S. at 881, or when the object of the statute is to prohibit the exercise of religion. *Id.* at 878.

By applying the "neutral" and "generally applicable" test instead of the "compelling interest" test, *Smith* tore the Free Exercise clause from the pantheon of First Amendment rights and at best demoted it to the status of a "suspect classification" under the equal protection clause.[2]

This stark contrast between the way in which religion is treated and the way in which free speech is treated is shown by a comparison between the majority opinion in *Smith* and the decision of the Court in *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). In *Barnes*, the Court applied its longstanding First Amendment rule that freedom of expression can only be repressed based upon a "compelling interest." *Id.* at 567.

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[2] The argument of the majority in *Smith* that applying the compelling interest test to Free Exercise claims creates "a constitutional anomaly" - "a private right to ignore generally applicable laws" *(Id.* at 886) is completely unfounded. Every challenge to a statute based on Free Speech or Free Press claims asks that a governmental requirement not be applied to the challenger. Thus these claims also request "a private right to ignore generally applicable laws." *Id.*

In contrast, Justice Scalia, the author of the opinion in *Smith*, concurred in *Barnes* on the basis that the Indiana statute at issue was a "a general law regulating conduct and not specifically directed at expression, [therefore] it is not subject to First-Amendment scrutiny at all." *Barnes*, 501 U.S. at 572. This is precisely the test adopted by the Court in *Smith* to evaluate Free Exercise of religion claims, yet the rest of the Court in *Barnes* applied a much different test in this free speech case.

This demonstrates two things. First, the author of *Smith* believes that the test adopted in that case should be applied to other First Amendment freedoms. Thus, the application of the *Smith* test does not turn upon anything intrinsic to the Free Exercise clause. Second, it demonstrates that the rest of the Court does not believe that the *Smith* test should be applied to other First Amendment freedoms (or at least free speech).

If Congress voted to give religious objectors, among those who assert First Amendment claims, "second class" protection without articulating the reason for different treatment, this Court would declare that Congress violated the Equal Protection guarantees. *See, e.g., Romer v. Evans*, ___U.S.___, 116 S. Ct. 1620, 1628 (1996). In fact, if Congress passed a law that codified the *Smith* rule, such a law would violate the *Smith* requirement of "neutrality" and "general applicability." For this Court to continue in a fashion denied to the other branches of government by the Constitution is untenable.

III. The Compelling Interest Test Has "Roots," *Smith* Does Not.

Justice Frankfurter, in *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) admonished that:

> *[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves

> collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

In other words, if a rule collides with earlier, better developed doctrine, it has no "roots." *United States v. Dixon*, 509 U.S. 688, 704 (1993).

That is precisely the problem with *Smith*. As Justice Thomas noted in his dissent to the denial of *certiorari* in *Swanner v. Anchorage Equal Rights Commission*, ___U.S. ___, 115 S. Ct. 460, 460 n.1 (1994), *Smith* "supplanted the compelling interest test in Free Exercise Clause jurisprudence."

The supplanted compelling state interest test, which Justice Thomas called the "*Sherbert-Yoder*" test, had been around at least since the dates of those decisions. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

In truth, the compelling interest test has roots that extend back 200 years, not just 30 years. The Virginia Statute for Establishing Religious Freedom was adopted in 1786. LEO PFEFFER, CHURCH STATE AND FREEDOM 113 (1967). That statute provided that when it came to religious opinion, "it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." *Id.* at 114. Justice Rutledge, in his dissent in *Everson v. Board of Education*, 330 U.S. 1, 32 n.9 (1947) opined that the Virginia Statute was "[p]ossibly the first official declaration of the 'clear and present' danger doctrine."

The clear and present danger standard, or variations on it, was used by this Court in testing Free Exercise claims. In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Court evaluated Cantwell's religious proselytizing by saying "the petitioner's communication, considered in the light of the

constitutional guarantees, raised no such clear and present menace to public peace and order...." *Id.* at 311. [3]

Later, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court specifically rejected the lower "rational basis" standard for the evaluation of Free Exercise claims. Instead, it determined that freedom "of worship" is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639.[4]

Barnette is a particularly important case for it showcases *Smith's* historical problem. While the majority in *Barnette* adopted a standard that was at least the equivalent of the compelling interest test, the dissent of Justice Frankfurter argued for the *Smith* standard. Frankfurter wrote:

> If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it ... cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches

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[3] *Amicus* notes, however, that the Court earlier referred to "general and non-discriminatory legislation" to regulate street solicitation permits.

[4] Even earlier, in *Pierce v. Society of the Sisters*, 268 U.S. 510, 535 (1925), the Court reviewed a statute which "[e]vidently was expected to have general application" requiring public school attendance for children between the ages of 8 and 16 years. Despite the general applicability of this statute, the statute was claimed to be unconstitutional because it interfered with the rights of parents to chose a Roman Catholic education for their children. *Id* at 532. Despite the general applicability of this statute, the Court struck down this violation of religious "liberty" on the basis that the legislation failed to have a reasonable relationship to a legitimate state purpose. *Id.* at 534-35. Failing to find even a reasonable basis for this generally applicable legislation, the Court was not called upon to test it against the higher compelling interest test.

> conscientious scruples or religious beliefs of an individual or a group.

Barnette, 319 U.S. at 651.[5]

Justice Frankfurter was right that the West Virginia pledge requirement was a generally applicable and neutral requirement. What is more, the Board in *Barnette* had even highlighted its intent to create a neutral, generally applicable rule in the introduction to the rule itself. *Id.* at 626, n.2. ("conscientious scruples have not in course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs.")

Thus, as early as 1943 the *Smith* test had been specifically rejected by the majority of the Court.

The "clear and present danger," "grave and immediate danger" test was simply a more colorful way of stating the *Sherbert-Yoder* "compelling interest" test. *Sherbert* cited *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) as its source for the compelling state interest test. *Sherbert*, 374 U.S. at 403. *Button* had cited *Cantwell* (among others) in its overview of the cases which set the constitutional parameters by which the issues in that case were to be judged. *Button*, 371 U.S. at 433. *Cantwell*, as shown above, recited the "clear and present danger" standard. 310 U.S. at 311. Thus, a 200 year-old line of precedent can be

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[5] In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court also specifically rejected the "generally applicable" test. In that case, the City of Jeanette had a forty-year-old ordinance requiring door to door salesmen to purchase a license to sell their wares. The Court held that this generally applicable, nondiscriminatory ordinance was unconstitutional when applied to those "selling" religious tracts as part of their practice of religion. "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. ... [E]quality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Id.* at 115.

drawn dating from the Virginia Statute for Establishing Religious Freedom in 1786 to *Yoder* in 1972.

Although this Court has not always clearly and uniformly applied the compelling interest test to Free Exercise claims, this was not so much because the Court was inartfully applying the "neutral" and "generally applicable" standard. Rather, the failure to clearly apply the compelling interest standard arose more from the distinctions based upon compulsion. If government compelled religiously proscribed behavior or punished religiously prescribed behavior through uniform and generally applicable laws, the compelling state interest standard applied. Consider what this Court wrote in *Bowen v. Roy*, 476 U.S. 693, 706 (1986):

> We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard.

When the City of Boerne denied the Archbishop the right to expand the St. Peter Church, it denied church members the right to worship together and therefore seriously interfered with their right of worship. This government interference with the fundamental right to meet together for religious services would historically have been tested by the compelling state interest standard.

It should be tested by that standard again.

A substantial motive behind the *Smith* rule appears to be the concern over the proliferation of religious beliefs. *Smith*, 494 U.S. at 888. ("Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.") Leaving to one side the fact that religious anarchy has not yet broken out despite the longstanding application of the "clear and present danger/ compelling interest" standard, the concern that accommodating religion might pinch is no excuse for drastically limiting that right. To the contrary, that is the very reason for the Free Exercise clause. Speaking of the religious right to refrain from pledging allegiance to the flag, Justice Jackson wrote:

> When they [religious beliefs] are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.*

Barnette, 319 U.S. at 642 (emphasis added).

It is not too great a stretch to say that the "neutral" and "generally applicable" rule looks much like a test of the "delivery system" for governmental action. As an example, unless the government specifically targets religion, the courts close their eyes to the reason for the action and the impact of that action on the religious beliefs of citizens. Only when the "product" is "delivered" to believers alone, or not delivered to everyone, does the Court look further at what is going on. From time to time the press reports on a deranged shooter who randomly machine-guns all of the unlucky victims who cross his path. The shooting is neutral and generally applicable in that the shooter is not consciously targeting any specific type of victim. The harm inflicted, however, is extreme.

Instead of looking at the scope of victims covered, the government should return to looking at the extent of the harm caused by the government so that a lethal approach to the most sacred religious beliefs of its citizens can be avoided.

This Court's past practice permits overruling *Smith* and reinstating the historic compelling interest standard so that Free Exercise rights will once again stand equal to the other First Amendment rights. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court overruled its recent decision in *Grady v. Corbin*, 495 U.S. 508 (1990). In *Solorio v. United States*, 483 U.S. 435 (1987), the Court overruled the less than ten-year-old decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969). In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Court overruled the ten-year-old decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). In *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) the Court overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989): decisions that were less than five years old. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 695-701 (1978) partially overruled *Monroe v. Pape*, 365 U.S. 167 (1961). *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) overruled the three-year-old *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), to reaffirm "pre-*Kesler* precedent."

CONCLUSION

Smith should be revisited and overruled. The *Barnette-Sherbert-Yoder* compelling interest test should be reinstated as the standard by which Free Exercise claims are judged. This will, once more, allow the Court to consider the relative interests of the state and the believer.

Respectfully submitted,

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